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Supreme Court of the United States

October Term, 1943.

THE HANNA FURNACE CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO AFFIRM UNDER RULE 12.

RALPH ULSH,
HARRY D. FENSKE,
JAMES McEVOY, JR.,
Counsel for Appellant.

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BATAVIA, N. Y.

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APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO AFFIRM UNDER RULE 12.

This case is pending on direct appeal under Section 47 (a) of Title 28 of the United States Code from a final decree of a statutory three-judge United States District Court for the Western District of New York, dismissing the appellant's complaint in an action brought to enjoin permanently and set aside an order of the Interstate Commerce Commission which directed the defendant carriers to cancel tariffs under which they paid the appellant an allowance for performing for their account car spotting at the appellant's blast furnace plant in the City of Buffalo, New York.

1. The questions raised on appeal.

This motion to affirm made by appellees, United States of America and Interstate Commerce Commission, is filed under Rules 12 (3) and 7 (4) on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The principal question raised by this appeal is whether or not the Commission had before it substantial evidence upon which to base its order. The District Court divided on this question, two judges holding that there was substantial evidence to support the order of the Commission and one judge holding, in a dissenting opinion, (a copy of which is hereto appended) that there was no evidence to support the order. It would seem elementary that if the judges of the trial court differ two to one and reach opposite conclusions as to whether or not there was substantial evidence before the Commission the question raised on an appeal is not unsubstantial.

Appellees' argument is that this court has in six cases affirmed similar orders arising out of this same *Ex Parte* 104 proceeding before the Commission and therefore there can be no merit to appellant's case, notwithstanding that appellant was not a party to any of those cases and this court did not have before it the facts in connection with the terminal operation at appellant's plant. Those six cases have no bearing at all on the question of the sufficiency of the evidence before the Commission in the present case. This court, in considering the general tests of the measure of terminal switching to which a shipper is entitled enunciated by the Commission in its main report in *Ex Parte* 104 (209 I. C. C. 11), was careful to point out in the first case *(United States v. American Sheet and Tin Plate Company, et al.*, 301 U. S. 402) that each case must be decided on its own facts.

The duty of a carrier with respect to delivery, as declared by this court in the *American Sheet and Tin Plate* case, is "to deliver freight in its freight depot or at team tracks or on sidings or spur tracks owned by an industry." It is this appellant's contention that what it asks of the

carriers in service or by allowance therefore does not exceed the service defined by the Court in the *American Sheet and Tin Plate* case thus:

> "The practice has come to be uniform that in delivering a car on a team track the carrier will spot the car at a point where merchandise of the class contained in the car is usually and most conveniently unloaded; thus there are particular team tracks or points where fruit and vegetables, furniture, etc., etc., are constantly loaded and unloaded and cars are spotted accordingly. In the analogous situation where an industry's warehouses or other facilities are located at given points on a spur or side-track, the carrier holds itself out to spot the car at the point where it is needed for loading or unloading, as a warehouse door, a scrap pile, etc., etc."

The Commission in *Ex Parte* 104 stated that if certain circumstances or conditions exist at any industrial plant the carrier is relieved from its obligation under the line-haul rate from performing the completed spotting service and its duty to the industry comes to an end when it places freight cars at so-called convenient points of interchange. These prescribed conditions are: (1) where the performance of completed service is prevented by the desire of the industry not to have the railroads perform it; (2) where the performance of the completed service is prevented by physical conditions in the layout of the plant and the side-tracks serving it such as the existence of extreme curvature, narrow gauge tracks, light weight rails or unsafe structures; and (3) where, if the railroads were to perform the completed service they would encounter interruption and interference from the industry's operations in the plant so that they could not complete the spotting service at their own operating convenience. In all of the supplemental reports and orders issued by the Commission in this *Ex Parte* proceeding that have been reviewed

by the courts the existence of one or more of these factors has been proved.

In the case of *United States v. Wabash Railroad Company* (decided March 27, 1944) the Court, after referring to the tests prescribed by the Commission in *Ex Parte* 104 to determine whether spotting service exceeds the transportation obligation of the carriers, said:

> "The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered."

Assuming that the tests prescribed by the Interstate Commerce Commission are correct they must be applied to the facts as they exist at the appellant's plant. The appellant is entitled to have this court review the evidence before the Commission in order to determine whether or not the tests have been properly applied and whether or not there is substantial evidence that under the application of the tests the spotting service at appellant's plant exceeds that to which it is lawfully entitled.

Unless the evidence before the Commission in this case substantiates the existence of one or more of the conditions hereinabove enumerated then the appellant, under the line-haul rates that it pays, is entitled to complete terminal service to the points of loading and unloading within its plant.

The Commission has not found or determined either that appellant does not desire the carriers to do the spotting or that the carriers were prevented from performing the completed service because of the existence of any physical impediments at appellant's plant.

Appellees in their motion assert that appellant prefers to perform its own spotting service. The record shows the contrary. It was stipulated by counsel at the trial that the allowance paid appellant by the railroads, established by published tariffs in 1921, was made after a complaint filed with the Commission by the industry demanding that the railroads be required either to perform the spotting in the plant or pay the industry for performing it. At the hearing before Examiner McGrath in Buffalo on February 4, 1942, counsel for appellant stated on the record:

> "It is our position in the proceeding * * * that if they (the carriers) do not pay the allowance then they should perform the service; and we would ask the Commission in this proceeding to make an alternative order, either to pay the allowance or perform the service, and the presentation of this witness is for the purpose of setting forth what service we feel we are entitled to receive."

The Commission in its report in the present case held as the sole ground of its order:

> "In fact the record is persuasive that railroad switching of line-haul cars in the plant would be marked by frequent interruptions and delays occasioned by intra-plant switching interference as well as the numerous stops to open and close switches incident to operation over so extensive a network of plant tracks.
>
> "From the evidence concerning the extent and character of switching operations from and to loading and unloading points on the furnace company's complex system of industrial tracks, it is apparent that such operations exceed the equivalent of team-track or simple switch placement, and that they constitute a service which respondents are not obliged to perform or to pay for under their line-haul rates."

The principal issue presented by the appeal is whether there is substantial evidence to support these findings.

If, as Judge Burke held, there was no evidence to su
port these findings, the appellant respectfully submits it
entitled to have this court set aside the order of the Co
mission. In determining this question the court is no mo
concerned with the decisions that it has rendered in oth
terminal allowance cases than it would be concerned wi
any other decisions in which it has either affirmed
reversed the Commission. The question can only
decided by a review of the evidence that was before t
Commission in this case. The Court cannot properly d
termine whether the order of the Commission was su
ported by substantial evidence on a motion to affirm, wit
out considering all the evidence, and giving appellant t
opportunity to present that evidence and argue the ca
before it.

2. The evidence on interference or interruption.

In considering the sufficiency of the evidence before t
Commission it must be remembered that this is not an a
versary proceeding. It is a proceeding instituted by t
Commission on its own motion to inquire into the validit
of tariffs observed by the appellant and the carriers fo
over 20 years. The burden was not on the appellant or t
carriers serving its plant to prove the tariffs were vali
but upon the Commission to prove that they were invali
In an *Ex Parte* proceeding the Commission has almost u
limited power to subpoena witnesses. It can send its i
vestigators into the field to study the conditions existin
at any plant and place these investigators upon the stan
to report upon the results of their study. It has the powe
to call expert witnesses who could testify as to the prope
method of operation of a blast furnace plant and the ha
dling of its transportation problems. The Commission i
this case held two hearings; one in the Fall of 1932, an

the other in February 1942. Six witnesses were called, who testified at one or both hearings. These witnesses were Frederickson, who in 1932 was the shipping clerk at appellant's plant and in 1942 assistant to the general superintendent; Glynn, Raughley and Reed of the Pennsylvania Railroad; Haines of the Lehigh Valley Railroad; and Treggesser of the South Buffalo Railway. Two exhibits were introduced. One was a map of appellant's plant, showing the track layout in reference to the buildings and structures located on appellant's property and the track connections with the carriers. The other consisted of copies of three allowance tariffs. All the witnesses were called by the Commission and questioned by its examiners and attorneys as well as by counsel for appellant and the carriers.

Frederickson was asked to describe the nature of appellant's business, the commodities received and shipped by freight, the volume of traffic handled in line-haul and intra-plant movements over a six months' test period in 1930, the manner of operation by the carriers and the industry under the allowance tariffs, and the manner in which the spotting would be done by the carriers if the tariffs were cancelled and the carriers furnished the completed terminal service to the points of loading and unloading within the plant. He testified that there are only 7 points in appellant's plant where cars in line-haul traffic are placed for loading and unloading. The Commission has found in its report that every one of these seven points is directly and easily accessible from, and connects directly with, the tracks of the carriers serving the plant. Frederickson testified that the industry can give the carriers the necessary instructions as to where the cars are to be placed and the railroads can then spot the cars at those places by direct movement at their own convenience. Thus, if the carriers

were to perform the completed spotting service it would not be necessary for the carriers to switch the cars first to the tracks now used as interchange tracks, and thereafter make a second spotting movement to the points of loading and unloading.

The fact that the carriers would not be required to use the interchange yard and make two movements to spot cars is one of the important features which distinguishes this case from all of the other cases that have been reviewed by this court, where, in each case, it was found that the cars must first be brought into an interchange yard and then switched to the points of loading and unloading. In those cases the Commission found that the spotting service beyond the interchange tracks could not be performed at the convenience of the carriers but that such movements must be subordinated to the desires of the industry. In other words, in those cases the carriers could not perform the service in one uninterrupted movement from the point of connection with the industry's track to the points of loading and unloading.

In the most recent case decided by this court, *United States v. Wabash Railroad Company*, the court emphasizes the importance of the existence of this double movement as constituting one of the chief reasons why an industry is not entitled to the completed service.

The question then is, in spotting the cars directly from the points of connection with the carriers' rails to the points of loading and unloading in appellant's plant, would the carriers encounter interruption or interference from plant operations? If the carriers encountered such interference or interruption, it could be only because the appellant would have to use the same tracks at the same time that the carriers would be using them.

The only direct evidence on this question is, as appellees concede, the testimony of Witness Frederickson. He testified that the plant operations would not require the industry to use the tracks used for spotting at the times when the railroads would be spotting cars and that no interference or interruption would be encountered.

Outbound shipments consist of pig iron. The volume is from 40 to 50 cars daily at maximum operation and includes approximately 75 per cent of all of the line-haul spotting service required from the carriers. In explaining that no interference or interruption would occur, Frederickson testified that spotting service for shipments of pig iron would take place on three tracks located in the southerly portion of appellant's plant, which tracks connect directly with the southerly track of the Pennsylvania Railroad leading into the appellant's plant, over which lead track the Lehigh Valley has trackage rights. These tracks are adjacent to and serve the pig-casting machine and are used primarily and almost exclusively for the purpose of loading with pig iron cars that are to be shipped out of the plant. It is not necessary for the carriers to spot cars on these tracks at any particular point as there is a car-puller in the vicinity of such tracks which spots the cars under the loading device and removes them as they are filled. The only service required on these tracks from the carriers would be to fill them with empty cars three times, possibly on occasion four times, in 24 hours and to remove the loaded cars. It is established by the evidence that the Pennsylvania and the Lehigh Valley make three to four deliveries of cars daily under present practice, and therefore this is no increase in service. The cars would merely be handled to and from the three tracks serving the pig machine instead of the so-called interchange tracks. In performing this service Frederickson said that the carriers

would not encounter any interruption or interference from plant operations because it would not be necessary for plant engines to operate over these same tracks.

Inbound carload shipments consist of from 10 to 15 cars per day, which would be spotted on six tracks, generally located on the fringes of appellant's plant remote from any manufacturing operations. Frederickson stated that the carriers would not encounter interference or interruption in spotting cars on these tracks because it would not be necessary for plant engines to operate over these tracks at the same time as they were being used by the carriers.

The railroad witnesses were not questioned to any extent about how they would perform the service if they were called upon to do so. Witness Glynn of the Pennsylvania Railroad testified:

> "There are not to my knowledge any obstructions or other difficulties that stand in the way of our rendering this service."

Witness Haines of the Lehigh Valley Railroad confirmed this testimony from the standpoint of his railroad.

Appellees state in their motion, page 6:

> "The only testimony that intraplant switching would not interefere with line-haul switching was by appellant's witness Frederickson. But, as the District Court stated 'the most liberal construction that can be placed upon his testimony is that by the stoppage of intraplant cars in movement deliveries could be made to certain spotting points without interference.' "

Frederickson was acquainted with appellant's plant and its operations. He was speaking with the background of that knowledge. His testimony was based upon the man-

ner in which the plant operates and the service that would be required from the carriers if they were to perform the completed spotting service to the points of loading and unloading. No other witness testified on the subject. He was neither contradicted nor impeached. He was qualified far beyond the members of the Commission to state the manner of operation if the railroads with their own power performed the line-haul switching in the plant. His testimony was ignored by both the Commission and the Court. To avoid the effect of the testimony it is said on this motion:

> "He was speaking concerning a hypothetical mode of operation which had never been adopted at this plant. This was the language of hope rather than of experience which the Commission was entitled to weigh and refuse to accept at face value."

The Commission is certainly not at liberty to refuse to accept the uncontradicted testimony of this witness, testifying at the instance of the Commission, where most of his testimony was elicited by the Commission's examiner or counsel, and substitute in its place unsupported inferences and conclusions.

Appellees condemn Frederickson's testimony on the charge that it sets forth a purely hypothetical mode of operation. However, Frederickson's testimony is no more hypothetical than the finding of the Commission that if the carriers were to perform the service they would encounter "frequent interruptions and delays occasioned by intra-plant switching operations."

There is not in the record before the Commission one word of testimony or a single fact or circumstance from which a valid finding can be made that the appellant would

need to operate its locomotives or cars or conduct other operations on the tracks on which line-haul cars are placed for loading or unloading at the same times as the railroads would be spotting the cars in the plant. No such finding was made by the Commission. Without such a finding there can be no legal determination, such as the Commission made, that spotting of cars by the railroads would encounter interference from intra-plant car movements.

Appellees contend that there is abundant circumstantial evidence to support the conclusions reached by the Commission.

The circumstances upon which the appellees rely are principally that Frederickson testified that there are several hundred intra-plant car movements daily; that there is a movement of coke through the plant, a movement of slag from the blast furnaces out of the plant, and a movement of molten iron within the plant; and that the map shows that there is a yard for the storage of pig iron adjacent to the tracks on which cars are loaded with pig iron. From the mere existence of these conditions it is asserted that the Commission can infer that the railroads would encounter interference in car spotting were they to perform that service. Admitting the existence of these conditions, there is no evidence whatever in the record that these operations or car movements take place in the appellant's plant at times, on tracks and under circumstances which would conflict with the spotting of cars by the railroads or cause any interference whatever. Without such evidence the existence of the conditions referred to does not support a finding of interference because they have no inherent significance with respect thereto.

There is, thus, on the one hand a complete absence of evidence that the activities, which it is claimed would interfere with car spotting by the railroads, would in fact interfere, and on the other hand, Frederickson's testimony that none of the plant operations would interfere with railroad spotting because they would not have to take place on the same tracks, at the same time that the carriers were using them for spotting, or are carried on in parts of the plant where no spotting is done.

The only other evidence in the record is the plant map. This map, explained by Frederickson, shows that there are 66 tracks, 14 miles in total length.

The findings of the Commission show that only 12 of the 66 tracks would be used for the spotting of line-haul cars, or approximately 1/5 of the total trackage in the plant. Frederickson's testimony and the Commission's findings show that the volume of line-haul transportation was approximately 1/6 of the total movement of cars within the plant during the test period.

The map alone cannot refute the positive testimony given by Witness Frederickson, particularly where it shows the existence of 54 tracks used exclusively for plant movements and over which no carrier operation is required. Nor is the map evidence that the plant activities and car movements occur at such times and on such tracks as to interfere with car spotting by the railroads.

The Commission has substituted its judgment and opinion for the uncontradicted testimony of a qualified witness who is familiar with the plant operations and the needs of this industry, and who testified as to what they are. It has met a lack of proof that plant activities would

interfere with spotting by the railroads by its own inference, opposed to the affirmative proof, that interference would result because the plant operations occur. Appellant submits that the rule requiring an order of the Commission to be based upon substantial evidence demands a greater showing than has been made by the Commission in this case.

The only other point made by the Commission, to support its determination that interference or interruption would exist, is that the carriers in reaching the points of loading and unloading would be required to open and close certain switches. In finding that stops to open and close switches amount to an interruption or interference the Commission injects something entirely new into these terminal allowance cases. Nowhere in the general report, the rules set forth in the appendix thereto, in any of the supplemental reports issued in this proceeding, or in any other case involving the right to spotting service, has the Commission once referred to the opening or closing of switches. There is no evidence in the record that the number of switches required to be opened or closed would be burdensome, or is in excess of the number encountered in team-track spotting. In fact, no witness was asked any questions about the switches. The opening and closing of switches is inherent in switching operations, whether on public team-tracks or private sidings, or elsewhere. In the absence of some finding that the number of switches was burdensome or greater than that usually encountered in performing service on public team-tracks and private sidings, made upon evidence presented before the Commission, there is no basis for the denial of service to appellant on the grounds that the opening and closing of switches at its plant constitutes interruption or interference with carrier spotting.

3. The evidence shows that the service involved in spotting at appellant's plant does not exceed that of so-called team-track or simple switch placement.

When the Commission in its General Report in *Ex Parte* 104 described the service in team-track delivery as the measure of the service to which an industry is entitled, it recognized the difficulty involved in a determination of whether the service at any industry in fact exceeds that on team-tracks. The Commission's solution of this dilemma was stated in its General Report as follows:

> "We are inclined to the belief that this argument has merit, but this assumption does not conflict with our view, which is that a determination of what constitutes a carrier's duty with respect to the equivalent of team-track or simple switch placement can readily be ascertained at any individual industry by experienced railroad operating men or committees if honestly performed without consideration of traffic reasons."

In determining whether or not the service at appellant's plant exceeds team-track placement the comparison properly to be made is a comparison between service at appellant's plant and service on team-tracks in the Buffalo switching district, for the reason that the line-haul freight rates on shipments, both originating and terminating within the Buffalo switching district, are concededly made by the carriers after taking into consideration the cost of terminal services performed in the Buffalo district.

The only evidence as to the comparison between the service given at appellant's plant and the service generally given on team-tracks in the Buffalo switching district was the testimony of Jasper N. Haines, Executive Assistant to the President and formerly General Manager of the Lehigh Valley Railroad Company. This witness was a

man with forty-four years of railroad operating experience, familiar with traffic conditions generally in the Buffalo switching district and familiar with the conditions at appellant's plant, having recently made an examination of the switching conditions there.

Witness Haines testified that the main break-up yard of the Lehigh Valley in the Buffalo Switching District was the Tifft terminal, at which yard incoming trains were broken up and the cars classified according to the team-tracks or industrial sidings to which they were consigned; that cars consigned to appellant's plant came into this terminal; and that appellant's plant is approximately a mile and four-tenths from the Tifft terminal, whereas some of the team-tracks within the Buffalo district were 14 miles from this terminal. The Examiner did not require the witness to produce any figures showing the cost of team-track service on any of the team-tracks of the Lehigh Valley in the Buffalo switching district. He was satisfied to ask only for the general comparison hereinafter quoted.

At the hearing in Buffalo on February 4, 1942, Examiner McGrath questioned Witness Haines at length, as follows:

> "Q. We are considering the specific instance we have here. What is your opinion as to how that service, if you should be called upon to provide it yourself, would compare with the service you now perform in making deliveries to team tracks in the Buffalo switching district?
>
> A. You would go through substantially the same performance at the Hanna plant as you would at a team track. You would spot the car at the designated point for loading or unloading.
>
> Q. I realize that. What is the relative measure of the service that would be required in making such de-

liveries, of spotting on the one hand, as compared with what you have to do and what you do do in making deliveries and receiving shipments from team tracks?

A. That is car for car—

Q. I am not speaking now with respect to what you are doing at the present time, but what you would have to do if you spotted the cars at various points within the plant?

A. Yes, taking it car for car the service would be substantially the same as on a team track. It might be less than on the team track, particularly where you come in contact with these combination team tracks and industry tracks along the railroad out in the country. I mean generally in the cities that is not true, but you have a combination team track and industry track, and frequently you have got to pull out cars to place your individual cars and then set them all up again; so, the placing of cars on the team track in practice is not so simple as it appears or is frequently spoken of. I think generally people think that when you spot a car on a team track you open the switch and kick it in. That isn't so.

Q. Can you give us the benefit of your views with respect to the particular situation in Buffalo here?

A. Well, you find those combination tracks, generally out along the road. Generally the team tracks are pretty well established and separate from the industry tracks. I should say, compared with the team tracks in Buffalo car for car, and the movement, if we were doing the spotting at the Hanna Corporation car for car, we would make about the same movement as we would on the team track.

Q. Well, would you require the same amount of time; would the expense be about the same, the operating expense substantially the same?

A. Yes, about the same per car."

This witness was not impeached nor was he discredited. His testimony was not refuted by any other witness called by the Commission. His testimony is the only testimony in the entire record showing a comparison between the

service rendered at appellant's plant and the service rendered for the public generally on team-tracks within the Buffalo district.

If the principles of industrial team-track spotting enunciated by the Commission in its General Report in *Ex Parte* 104 are sound, then the Commission must apply those principles to the facts developed at appellant's plant. If in cases of doubt a comparison between industrial switching and team-track switching is to be based upon the expert knowledge of a railroad operating witness that test has been met by the record in this case. The Commission has disregarded this evidence and has entered its finding that the service exceeds team-track spotting based, not upon the evidence, but only upon the Commission's expert opinion, which is contrary to the only evidence given in the case. This was erroneous. (*Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88).

Regardless of rules and definitions laid down by the Interstate Commerce Commission the appellant is as a matter of law entitled to the same quantity of transportation service furnished by the railroads to shippers on team-tracks. If as a matter of fact the spotting service at the appellant's plant does not exceed that at team-tracks in the Buffalo switching district, it does not become so by decision of the Commission in disregard of the facts. The Commission therefore cannot discard the testimony as to the facts relating to the nature and extent of team-track service and determine the appellant's right to service by the application of hypothetical conceptions of the nature and extent of team-track spotting.

4. The Commission has not determined in this case or in any case the extent and complexity of spotting service furnished shippers on team-tracks, which it has applied as a standard of measurement in this case.

In its *Ex Parte* 104 investigation the Commission did not take testimony as to the character, extent and complexity of car spotting on team-tracks, which it did, however, prescribe as the measure of the spotting service which may be furnished an industry. There was some testimony taken in the early stages of the proceeding as to the cost of spotting cars on team-tracks, and this showed a cost generally in excess of the cost of spotting cars at the appellant's plant under its present method of operation.

In the present case there was testimony, quoted partially above herein, developed by the Examiner for the Commission from a qualified, experienced railroad operating man on the character of team-track spotting service in the Buffalo switching district, which shows that the service at appellant's plant does not exceed team-track service. That evidence shows further that spotting a car on a team-track is not a simple, uninterrupted movement but frequently requires the carriers "to pull out cars to place your individual cars and then set them all up again." In addition to the multiple operations involved in a spotting of that sort, the simplest spotting of a car from a main line to a team-track manifestly requires also four stops to throw switches.

The appellees would supply the lack of evidence in the record as to the extent and complexity of team-track spotting by definitions furnished by their counsel on this motion. It seems needless to say that the record cannot be

eked out in that fashion. Even these definitions given by counsel tell us nothing of the extent and character of the maneuvers and movements of engines and cars entailed in such switching operations or the interferences, delays and interruptions encountered by the carriers in such movements. The Commission on the other hand, as has already been shown, recognized the difficulty in determining whether car-spotting on an industry's tracks exceeds team-track spotting, a difficulty which the Commission suggested could be met by an investigation by a qualified railroad operating man, although it rejected the proof of such an investigation in the present case.

The appellant contends that a finding by the Commission that the spotting in its plant exceeds the service rendered by the railroads in spotting cars on team-tracks and industrial Spur tracks, without receiving evidence and determining the extent and relative cost of spotting service on team-tracks, especially in the Buffalo switching district, is wholly arbitrary and without legal basis. The District Court has answered this contention by stating that it is unnecessary to determine the extent of service required in team-track spotting because the Commission has determined "what is in excess of team-track spotting." This, it is submitted, is a contradiction in terms. Without knowing the size and extent of the standard to be used as a comparison there can be no such thing as a determination of what exceeds the standard.

The appellant does not seek from the carriers any free service or any rebate, or any service in excess of that accorded by the carriers to shippers generally. It does, however, insist that it is entitled to have as much and as extensive service as is provided for shippers generally as a

part of line-haul transportation, and particularly for shippers who receive and ship their freight at public team-tracks in the Buffalo switching district. Under the decision rendered by the Commission the appellant has been deprived of that service.

The question here raised by appellant, of the absence of any determination of the extent of service involved in team-track delivery, which the Commission has used as a standard, has never been presented to or passed upon by this Court in any of the cases which have come before it for consideration, and the appellant is not precluded by any prior decisions from presenting it for determination in the present case. This issue, the appellant respectfully urges, is both substantial and important.

Conclusion.

From the brief review of the evidence taken by the Commission in this case, (necessarily not inclusive on this motion), and the discussion of the issues raised by the appeal, we believe it has been made apparent that the issues presented are substantial. It is respectfully submitted that the motion to affirm should be denied.

RALPH ULSH,
HARRY D. FENSKE,
JAMES McEVOY, JR.,
Counsel for Appellant.

APPENDIX.

Dissenting Opinion of Judge Burke.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK.

THE HANNA FURNACE CORPORATION,

vs.

UNITED STATES OF AMERICA, *et al.*

The order of the Commission must find support in the evidence on at least one of the following grounds: That the plaintiff's trestle would not support railroad locomotives, that opening and closing of switches would constitute interference, or that intra-plant operation would cause interruptions with car-spotting movements if conducted by the railroads. There is no evidence and no finding that the trestle would not bear the weight of railroad locomotives. There is no basis in precedent for sustaining such an order of the Commission on the ground that opening and closing of switches constitutes an interference in car-spotting movements. It is inherent in the operation. There is no evidence that the number of switches required to be opened or closed would be burdensome.

The plaintiff and its predecessor have for 21 years performed their own car spotting under an allowance from the railroads. The only evidence as to the manner of car spotting that was before the Commission related to how it had been done by the plaintiff under those circumstances. Plaintiff had the right to conduct those operations in its own way and suited best to its own convenience. It does not follow that it would have to be done in the same manner if

the service were performed by the railroads. The Commission had before it a map showing the layout of plaintiff's tracks and buildings and evidence as to the volume of car movements conducted within the plant. On that evidence it has based its finding that car spotting, if conducted by the railroads, "would be marked by frequent interruptions and delays occasioned by intra-plant switching interference." The only evidence on the question of possible interference with car spotting movements, if conducted by the railroads, was the testimony of Friederickson, assistant to plaintiff's general superintendent, who was competent to testify as to the requirements of the industry and he had knowledge of the way plaintiff's business was and could be conducted. He testified regarding the requirements and manner of operation of defendant's plant. He said that there would be no interference by intra-plant traffic with car spotting movements and explained that the plaintiff would not have to conduct its car movements at the same time and in the same location where the railroads would be performing car spotting service. The Commission has rejected this testimony. There is no more ground for holding that there would be interference on the basis of the Commission's expert knowledge, without evidence, than there would be for holding that the plaintiff's trestle would not support the weight of railroad switching engines on the basis of the Commission's expert knowledge, without evidence. In United States v. Pan American Petroleum Corp., 304 U. S. 156 the court pointed out that the Commission had before it maps exhibiting the character and extent of the plant trackage, its relation and accessibility to the main line tracks of the carriers concerned and proofs as to the volume and the nature of intra-plant movements, the amount of engine services required and other relevant facts. I take this to mean that, included in the proofs as

to the nature of intra-plant car movements and other relevant facts, there was evidence not only as to the materials being carried in intra-plant car movements but also as to the time when it was necessary in the industry to conduct such car movements.

I think the Commission's finding that car spotting, if conducted by the railroads, "would be marked by frequent interruptions and delays occasioned by intra-plant switching interference" is not supported by substantial evidence and is contrary to the only evidence on the subject in the case and, as such, is beyond the power of the Commission, I. C. C. v. Louisville and Nashville Railroad Co., 277 U. S. 88. I would give judgment for the plaintiff.

Dated: December 3, 1943.

HAROLD P. BURKE,
United States District Judge.